BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF CHENEY INVESTMENT COMPANY, Appellant, v. SPOKANE COUNTY AIR POLLUTION CONTROL AUTHORITY, Respondent.	)	PCHB No. 86-80 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of a notice and order of four civil penalties totaling $2,700 for allegedly maintaining an open fire containing prohibited material (rubber tires), came on for formal hearing before the Pollution Control Hearings Board; Lawrence J. Faulk (presiding), and Wick Dufford, on May 22, 1986, in Spokane, Washington. Gayle Rothrock, Board member, has read the record and joins in the opinion.

Appellant Cheney Investment Company was represented by Mr. A. L. Armstrong, the former president and for all practical purposes the

person responsible for the affairs of the company. Respondent Spokane County Air Pollution Control Authority (SCAPCA) was represented by attorney at law Steven Miller. Spokane court reporting firm "On the Record" in the person of Kenneth J. Wittstock recorded the proceeding.

Witnesses were sworn and testified. Exhibits were examined. Argument was heard. From the testimony, evidence and contentions of the parties, the Board makes these

FINDINGS OF FACT

I

The Spokane County Air Pollution Control Authority (SCAPCA) is an activated air pollution control authority under terms of chapter 70.94 RCW, empowered to adopt and enforce outdoor burning regulations.

The agency has filed with the Board copies of its Regulations I and II, and all amendments thereto, of which we take official notice.

II

Cheney Investment Company is an inactive corporate entity which owns an abandoned gravel pit in Four Lakes, near Cheney, Washington. The operations of the corporation have at all relevant times been directed by A. L. Armstrong. In 1977 he moved a large number of rubber tires onto the pit site to store them until he could recycle them. However, the county has never approved the use of the site for storing tires or the construction of a plant to recycle them. The gravel pit is not fenced. The gravel pit is near residences, the closest being around 300 yards from the tire pile.

III

On April 20, 1986, (Sunday) the pile of tires (estimated to contain about 80,000 tires) was set on fire by unknown causes. Units within Spokane County Fire Protection District #3 (SCFPD#3) responded on that date but found the fire was too big for them to readily extinguish. The fire, while large and producing great amounts of very black smoke, was not considered to present any danger of spreading or harming other property because of its location within the sizable gravel pit.

IV

On April 21, 1986, about 8:15 a.m. respondent's inspector, as a result of complaints drove to the site of the fire. She could see the heavy black smoke plume from her office over ten miles from the gravel pit. Once at the site, she observed an immense tire fire, much black smoke and detected an obnoxious odor. She took pictures and discussed the fire with SCFPD#3 personnel. By a later check of the County Assessor's and Treasurer's records, she determined that the owner of the property was Cheney Investment Company.

V

On April 21, firefighting authorities borrowed a bulldozer from the nearby Turnbull National Wildlife Refuge and attempted to cover the fire. This effort proved unsuccessful when the bulldozer broke down after working for several hours. The fire continued to blaze until the following day. Complaints about the fire, the smoke and the fear of toxic gases were numerous.

A. L. Armstrong appeared on the scene that day and conversed about the fire with the chief of SCFPD#3, and acknowledged that the land and the tires were the property of Cheney Investment.

VI

On April 22, 1986, the effort to extinguish the fire continued with a bulldozer supplied by Spokane County. This time the effort to cover the pile was successful. Fine dirt was not available and the fire was too hot to allow the dozer to move the tires at all. But when the fire was covered with rocks the major portion of the smoke was contained.

From that day through the date of hearing the fire continued smoldering. The fire chief estimated that it has been reduced to less than one percent of the emissions given off before it was covered. In the intervening time the firemen have gone back to the site three times with water to suppress flames.

VII

On April 25, 1986, four notices of violation (NOV) and civil penalties totaling $2,700 were issued by respondent agency to appellant Armstrong and Cheney Investment Company. NOV 3809 was for the violation that occurred on April 20, 1986, and was for $250. NOV Number 3810 was issued for the violations that occurred on April 21, 1986, for $500. NOV Number 3811 was issued for the violations that occurred on April 22, 1986, for $1,000. NOV Number 3812 was issued for the violations that occurred on April 23, 1986, for $1,000. All incidents wwere allegedly a violation of respondent's Regulation I,

Article VI, Section 6.01 and WAC 173-425.

VIII

Appellant Armstrong timely appealed by letter received by this Board on May 7, 1986.

IX

SCAPCA's director testified that the penalties assessed represented a gradual escalation of fines, a technique commonly used for continuing offenses. The burning was, in his view, a clear violation of the Authority's rules and an offense of considerable magnitude, considering the size of the blaze, the dense smoke, the possible emission of harmful organic compounds and the proximity of residential areas. He noted that tires were still smoldering.

X

Mr. Armstrong and Cheney Investment have no record of prior violations.

He neither started the fire nor instructed anyone to start it. He admits he placed the tires on the property, but believes little could have been done to reduce the risk that it would be ignited. He noted that the flames at times reached over 100 feet high and stated that there is little a property owner could do to fight such a fire. However, the record does not disclose that Mr. Armstrong or Cheney Investment have done anything to help the situation since the fire was brought under control. Mr. Armstrong's view is that neither he nor the company is responsible for it.

X

Exactly how the fire started remains unknown. Its location and character seem to rule out being accidentally started.

But, the tires were piled outdoors, in the open, readily accessible to anyone who might wander by. No fence was erected. No "Keep out" signs were posted. Access was not in any way impeded. Interlopers were apparently beginning to use the area as a dump. Those testifying believe that the fire was deliberately ignited by a trespasser.

XI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the issues and parties. Chapters 43.21B and 70.94 RCW.

II

The Legislature of the state of Washington has enacted the following policy on outdoor fires:

> It is the policy of the state to achieve and maintain high levels of air quality and to this end to minimize to the greatest extent reasonably possible the burning of outdoor fires. Consistent with this policy, the legislature declares that such fires should be allowed only a limited basis under strict regulation and close control. RCW 70.94.740.

III

Each Notice of Violation alleges generally that on the date of its issuance, the open fire violated Article VI, Section 6.01 of SCAPCA's Regulation I and WAC 173-425. These regulations absolutely prohibit the burning of rubber products in any outdoor fire. In this regard they simply repeat the prohibition contained in the State Clean Air Act itself. RCW 70.94.775.

IV

We conclude that the fire on Cheney Investment's property April 20, 21, 22, and 23, 1986, violated WAC 173-425-045, and Section 6.02(5). The fires contained prohibited materials which could not be burned.

V

Property owners are prima facie responsible for unlawful fires involving their property. Such owners can, however, be absolved of responsibility by showing that neither their actions nor their ownership are so connected with the unlawful event as to have "allowed" it. Sprague v. SWAPCA, PCHB No. 85-69 (October 14, 1985).

VI

Normally a property owner is held responsible for unlawful fires started by trespassers, spontaneous combustion, or unknown causes. Davenport v. DOE, PCHB No. 79-208 (April 24, 1980); Cathlamet v. SWAPCA, PCHB No. 78-249 (June 29, 1979). This, however, is not because the property owner is the only person available to charge. It is rather because in the usual case, the property owner created a

substantial risk that an unauthorized fire would occur. Property owners who assemble and then leave unattended piles of burnable debris in circumstances which can be said to invite a fire to be started, are held to have "allowed" such fires as are started. See Kneeland v. OAPCA, PCHB No. 778 (July 17, 1975); Terry's Thriftway v. PSAPCA, PCHB No. 85 (July 12, 1972), Cummings v. Department of Ecology, PCHB No. 85-89 (November 15, 1985).

VII

Here, appellant assembled a huge pile of old tires in an open and unattended location and took little if any precaution to impede undetected access to them. This lack of precaution created the risk which eventuated in the fire which occurred.

Under all circumstances, we conclude that it is proper to hold appellant legally responsible for "allowing" the fire which occurred.

VIII

RCW 70.94.431(1) authorizes the imposition of a civil penalty for violation of the Clean Air Act or its implementing regulations. The penalty shall be "in the form of a fine in an amount not to exceed one thousand dollars per day for each violation." The term "not to exceed" necessarily implies the use of judgment in determining how much the penalty should be in any instance.

The statute sets no explicit standards, but implicit in the penalizing function is an individualized consideration focusing on the seriousness of the violation and the behavior of the violator. The review procedures available before this Board provide a procedural

safeguard against arbitrary action in penalty setting, Glascam Builders v. Yakima County Clean Air Authority, 85 Wn.2d 255, 534 P.2d 33 (1975), but the initial assignment of penalty by the agency should reflect a consideration of the circumstances and an attempt to select the level of sanction appropriate to the particular case.

IX

The purpose of the civil penalty is not primarily retribution but rather to influence the behavior of the perpetrator and to deter violations generally. Under the facts before us we do not believe these objectives are served by the progressive escalation of the penalties. It is not clear what the agency was seeking to encourage Cheney Investment to do by this course of action. The worst of the fire occurred during the days of least penalty and the blaze was essentially brought under control on the days of highest penalty. What role the agency felt the landowner should or could play in these events does not appear on this record.

We recognize that this was a very large fire which produced a very large amount of smoke observable over a great area. There is, however, no showing of any environmental harm resulting from the blaze. Moreover, the event resulted from a miscalculation of risks rather than calculated law breaking.

Nonetheless, appellant needs to accept responsibility for the situation and should become actively involved in the eventual clean up of the problem. Considering all the circumstances we conclude that

the objectives of both specific and general deterence would appropriately be served by penalties of equal amount for each of the days in question.

X

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law the Board enters this

ORDER

An aggregate of $1,000 in penalties is affirmed. NOV #3809 is affirmed. NOV 3810 is affirmed in the amount of $250; $250 thereof is vacated. NOV 3811 is affirmed in the amount of $250; $750 thereof is vacated. NOV #3812 is affirmed in the amount of $250; $750 thereof is vacated.

DONE this 24th day of June, 1986.

POLLUTION CONTROL HEARINGS BOARD

6/24/86

LAWRENCE J. FAULK, Chairman

GAYLE ROTHROCK, Vice Chairman

WICK DUFFORD, Lawyer Member